

RESEARCH APPENDIX

Date Transfer Requested: 11/30/2018 (Per: CMH)

Part
2 of 2

☞ Appendix K ... has been added to the 2017 LRB-6071

Appendix A ☞ LRB 17-5979

Appendix B ☞ LRB 17-5982

Appendix C ☞ LRB 17-5983

Appendix D ☞ LRB 17-5986

Appendix E ☞ LRB 17-5989

Appendix F ☞ LRB 17-5995

Appendix G ☞ LRB 17-5998

Appendix H ☞ LRB 17-6006

Appendix I ☞ LRB 17-6007

Appendix J ☞ LRB 17-6012

Appendix K ☞ LRB 17-6021

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Appendix W ☞ LRB 17-6049

Appendix X ☞ LRB 17-6050

Appendix Y ☞ LRB 17-6052

Appendix Z ☞ LRB 17-6059

Appendix AA ☞ LRB 17-6065

Appendix BB ☞ LRB 17-6067



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-6021/P6
SWB/RAC/CMH:all

1/17

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 **AN ACT** *to renumber and amend* 165.08; *to amend* 165.10, 165.25 (6) (a),
2 806.04 (11) and subchapter VIII (title) of chapter 893 [precedes 893.80]; and *to*
3 **create** 13.365, 803.09 (2m) and 893.825 of the statutes; **relating to:** notice to
4 the legislature of claims relating to constitutionality of statutes and right of the
5 legislature to intervene and state settlement moneys and the settlement
6 authority of the attorney general.

Analysis by the Legislative Reference Bureau

***Notice to legislature of claims relating to constitutionality of statutes;
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757

(1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

State settlement moneys and settlement authority of attorney general

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 13.365 of the statutes is created to read:

in state or federal court

1 **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action
2 challenges the constitutionality of a statute, facially or as applied, as part of a claim
3 or affirmative defense:

4 (1) The committee on assembly organization may intervene in the action on
5 behalf of the assembly. The committee on assembly organization may obtain legal
6 counsel other than from the department of justice, with the cost of representation
7 paid from the appropriation under s. 20.765 (1) (a), to represent the assembly in any
8 action in which the assembly intervenes.

9 (2) The committee on senate organization may intervene in the action on behalf
10 of the senate. The committee on senate organization may obtain legal counsel other
11 than from the department of justice, with the cost of representation paid from the
12 appropriation under s. 20.765 (1) (b), to represent the senate in any action in which
13 the senate intervenes.

14 (3) The joint committee on legislative organization may intervene in the action
15 on behalf of the state. The joint committee on legislative organization may obtain
16 legal counsel other than from the department of justice, with the cost of
17 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as
18 determined by the cochairpersons, to represent the state in any action in which the
19 joint committee on legislative organization intervenes.

20 **SECTION 2.** 165.08 of the statutes is renumbered 165.08 (1) and amended to
21 read:

22 165.08 (1) Any civil action prosecuted by the department by direction of any
23 officer, department, board, or commission, shall be compromised or discontinued
24 when so directed by such officer, department, board, or commission.

3-19 →

1 (2) Any civil action prosecuted by the department on the initiative of the
2 attorney general, or at the request of any individual may be compromised or
3 discontinued with the approval of the governor by submitting a proposed plan to the
4 joint committee on finance for the approval of the committee. The compromise or
5 discontinuance may occur only if the joint committee on finance approves the
6 proposed plan. No proposed plan may be submitted to the joint committee on finance
7 if the plan concedes the unconstitutionality or other invalidity of a statute, facially
8 or as applied, without the approval of the joint committee on legislative organization.

9 (3) In any criminal action prosecuted by the attorney general, the department
10 shall have the same powers with reference to such action as are vested in district
11 attorneys.

12 **SECTION 3.** 165.10 of the statutes is amended to read:

13 **165.10 ~~Limits on expenditure~~ Deposit of discretionary settlement**
14 **funds.** Notwithstanding s. 20.455 (3), before the ~~The~~ attorney general may expend
15 shall deposit all settlement funds under s. 20.455 (3) (g) that ~~are not committed~~
16 ~~under the terms of the settlement, the attorney general shall submit to the joint~~
17 ~~committee on finance a proposed plan for the expenditure of the funds. If the~~
18 ~~cochairpersons of the committee do not notify the attorney general within 14 working~~
19 ~~days after the submittal that the committee has scheduled a meeting for the purpose~~
20 ~~of reviewing the proposed plan, the attorney general may expend the funds to~~
21 ~~implement the proposed plan. If, within 14 working days after the submittal, the~~
22 ~~cochairpersons of the committee notify the attorney general that the committee has~~
23 ~~scheduled a meeting for the purpose of reviewing the proposed plan, the attorney~~
24 ~~general may expend the funds only to implement the plan as approved by the~~
25 committee into the general fund.

12
5-1 → SECTION 4. 165.25 (6) (a) of the statutes is amended to read:

2 165.25 (6) (a) ~~At 1. Except as provided in s. 893.825 (2),~~ at the request of the
3 head of any department of state government, the attorney general may appear for
4 and defend any state department, or any state officer, employee, or agent of the
5 department in any civil action or other matter brought before a court or an
6 administrative agency which is brought against the state department, or officer,
7 employee, or agent for or on account of any act growing out of or committed in the
8 lawful course of an officer's, employee's, or agent's duties. Witness fees or other
9 expenses determined by the attorney general to be reasonable and necessary to the
10 defense in the action or proceeding shall be paid as provided for in s. 885.07.

11 2. The attorney general may compromise and settle the action as the attorney
12 general determines to be in the best interest of the state except that, if the action is
13 for injunctive relief or there is a proposed consent decree, the attorney general may
14 not compromise or settle the action without first submitting a proposed plan to the
15 joint committee on finance. If, within 14 working days after the plan is submitted,
16 the cochairpersons of the committee notify the attorney general that the committee
17 has scheduled a meeting for the purpose of reviewing the proposed plan, the attorney
18 general may compromise or settle the action only with the approval of the committee.
19 The attorney general may not submit a proposed plan to the joint committee on
20 finance under this subdivision in which the plan concedes the unconstitutionality or
21 other invalidity of a statute, facially or as applied, without the approval of the joint
22 committee on legislative organization.

23 3. Members, officers, and employees of the Wisconsin state agencies building
24 corporation and the Wisconsin state public building corporation are covered by this
25 section. Members of the board of governors created under s. 619.04 (3), members of

1 a committee or subcommittee of that board of governors, members of the injured
2 patients and families compensation fund peer review council created under s.
3 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are
4 covered by this section with respect to actions, claims, or other matters arising
5 before, on, or after April 25, 1990. The attorney general may compromise and settle
6 claims asserted before such actions or matters formally are brought or may delegate
7 such authority to the department of administration. This paragraph may not be
8 construed as a consent to sue the state or any department thereof or as a waiver of
9 state sovereign immunity.

10 **SECTION 5.** 803.09 (2m) of the statutes is created to read:

11 **803.09 (2m)** When a party to an action challenges the constitutionality of a
12 statute, facially or as applied, as part of a claim or affirmative defense, the assembly,
13 the senate, and the state legislature may intervene in the action as a matter of right
14 by serving a motion upon the parties as provided in s. 801.14. For purposes of this
15 subsection, a motion to intervene shall be considered timely if it is filed within 45
16 days of receiving service under s. 806.04 (11) or 893.825 or if no service has been made
17 under s. 806.04 (11) or 893.825.

18 **SECTION 6.** 806.04 (11) of the statutes is amended to read:

19 **806.04 (11) PARTIES.** When declaratory relief is sought, all persons shall be
20 made parties who have or claim any interest which would be affected by the
21 declaration, and no declaration may prejudice the right of persons not parties to the
22 proceeding. In any proceeding which involves the validity of a municipal ordinance
23 or franchise, the municipality shall be made a party, and shall be entitled to be heard.
24 If a statute, ordinance or franchise is alleged to be unconstitutional, the attorney
25 general shall also be served with a copy of the proceeding and, except as provided

m. state or federal court ✓

1 under this subsection, be entitled to be heard. If a statute is alleged to be
2 unconstitutional, the speaker of the assembly, the president of the senate, and the
3 senate majority leader shall also be served with a copy of the proceeding and the
4 assembly, the senate, and the state legislature are entitled to be heard. The assembly
5 shall represent the assembly, the senate shall represent the senate, and the joint
6 committee on legislative organization shall represent the state. In an action
7 involving the constitutionality of a statute, if the joint committee on legislative
8 organization determines that the interests of the state will be best represented by
9 special counsel appointed by the legislature, it shall appoint special counsel to
10 represent state defendants and act instead of the attorney general. Special counsel
11 appointed under this subsection shall have the powers of the attorney general with
12 respect to the litigation to which special counsel has been appointed. In any
13 proceeding under this section in which the constitutionality, construction or
14 application of any provision of ch. 227, or of any statute allowing a legislative
15 committee to suspend, or to delay or prevent the adoption of, a rule as defined in s.
16 227.01 (13) is placed in issue by the parties, the joint committee for review of
17 administrative rules shall be served with a copy of the petition and, with the approval
18 of the joint committee on legislative organization, shall be made a party and be
19 entitled to be heard. In any proceeding under this section in which the
20 constitutionality, construction or application of any provision of ch. 13, 20, 111, 227
21 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a
22 legislative committee to suspend, or to delay or prevent the adoption of, a rule as
23 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on
24 legislative organization shall be served with a copy of the petition and the joint
25 committee on legislative organization, the senate committee on organization or the

If the assembly, the senate, or the joint committee on legislative organization ~~also~~
intervene as provided under s. 803.09 (2m), the

INS
8-3 (SWB)
1 assembly committee on organization may intervene as a party to the proceedings and
2 be heard.

3 SECTION 7 Subchapter VIII (title) of chapter 893 [precedes 893.80] of the
4 statutes is amended to read:

CHAPTER 893

SUBCHAPTER VIII

CLAIMS AGAINST GOVERNMENTAL

BODIES, OFFICERS AND EMPLOYEES;

CONSTITUTIONAL CLAIMS

5
6
7
8
9
10 SECTION 8 893.825 of the statutes is created to read:

11 **893.825 Claim alleging a statute is unconstitutional.** (1) If a statute is
12 alleged to be unconstitutional, the attorney general shall be served with a copy of the
13 proceeding and, except as provided in sub. (2), is entitled to represent the state and
14 be heard.

15 (2) If a statute is alleged to be unconstitutional, the speaker of the assembly,
16 the president of the senate, and the senate majority leader shall also be served with
17 a copy of the proceeding and the assembly, the senate, and the joint committee on
18 legislative organization are entitled to be heard. The assembly shall represent the
19 assembly, the senate shall represent the senate, and the joint committee on
20 legislative organization shall represent the state. In an action involving the
21 constitutionality of a statute, if the joint committee on legislative organization
22 determines that the interests of the state will be best represented by special counsel
23 appointed by the legislature, it shall appoint special counsel to represent state
24 defendants and act instead of the attorney general. Special counsel appointed under

IF the assembly, the senate, or the joint committee on legislative organization
wishes to intervene as provided under 893.09 (2m), the

1 this subsection shall have the powers of the attorney general with respect to the
2 litigation to which special counsel has been appointed.

3 **SECTION 9 Fiscal changes.**

4 (1) Notwithstanding s. 20.001 (3) (c), from the appropriation account under s.
5 20.455 (3) (g), on the effective date of this subsection, there is lapsed to the general
6 fund the unencumbered balance of any settlement funds in that appropriation
7 account, as determined by the attorney general.

8 (END)

↓
INS
9-3
(SWB)

SETTLEMENT
FUNDS.

**2019-2020 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P6ins
SWB/RAC/CMH:all

1
2
3 ✓ Insert 4-12 3-19 5a ✓

4 **SECTION 1.** 165.07 of the statutes is created to read:

5 **165.07 Intervention by joint committee on legislative organization.** If
6 the joint committee on legislative organization intervenes in an action in state or
7 federal court as permitted under s. 803.09 (2m)✓, the attorney general shall notify the
8 court of the substitution of counsel by special counsel appointed by the joint
9 committee on legislative organization and may not participate in the action.

10
11 ✓ Insert 5-1

12 **SECTION 2.** 165.25 (1m) of the statutes is amended to read:

13 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If the joint committee on
14 legislative organization does not intervene as permitted under s. 803.09 (2m)✓, if
15 requested by the governor or either house of the legislature, appear for and represent
16 the state, any state department, agency, official, employee or agent, whether
17 required to appear as a party or witness in any civil or criminal matter, and prosecute
18 or defend in any court or before any officer, any cause or matter, civil or criminal, in
19 which the state or the people of this state may be interested. The public service
20 commission may request under s. 196.497 (7) that the attorney general intervene in
21 federal proceedings. All expenses of the proceedings shall be paid from the
22 appropriation under s. 20.455 (1) (d).

History: 1971 c. 125 s. 522 (1); 1971 c. 215; 1973 c. 333; 1975 c. 81, 199; 1977 c. 29 s. 1656 (27); 1977 c. 187, 260, 273, 344; 1981 c. 20, 62, 96; 1983 a. 27; 1983 a. 36 s. 96 (2), (3), (4); 1983 a. 192; 1985 a. 29, 66; 1987 a. 416; 1989 a. 31, 115, 187, 206, 359; 1991 a. 25, 39, 269; 1993 a. 27, 28, 365; 1995 a. 27 ss. 4453 to 4454m, 9126 (19); 1995 a. 201; 1997 a. 27, 111; 2001 a. 16; 2003 a. 111, 235; 2005 a. 96, 458; 2007 a. 1; 2007 a. 20 ss. 2904, 9121 (6) (a); 2007 a. 76, 79, 96, 130, 225; 2009 a. 2, 28, 42; 2011 a. 32, 35; 2013 a. 20 ss. 164, 166, 167, 180, 1904m; 2013 a. 166 s. 76; 2013 a. 173, 223, 241; 2015 a. 55, 118; 2017 a. 59, 261, 337.

1

INSERT 8-3 (SWB)

2 ~~§~~ **SECTION 7.** 809.13 of the statutes is amended to read:

3 **809.13 Rule (Intervention).** A person who is not a party to an appeal may
4 file in the court of appeals a petition to intervene in the appeal. A party may file a
5 response to the petition within 11 days after service of the petition. The court may
6 grant the petition upon a showing that the petitioner's interest meets the
7 requirements of s. 803.09 (1) ~~or~~, (2), or (2m).

History: Sup. Ct. Order, 83 Wis. 2d xiii (1978); 1981 c. 390 s. 252; Sup. Ct. Order No. 00-02, 2001 WI 39, 242 Wis. 2d xxvii.

Judicial Council Committee's Note, 1978: Former s. 817.12 (6) permitted the addition of parties but did not set the criteria for doing so. This void is filled by making the intervention rule in the Rules of Civil Procedure applicable to proceedings in the Court of Appeals. [Re Order effective July 1, 1978]

Judicial Council Note, 2001: The 7-day time limit has been changed to 11 days. Please see the comment to s. 808.07 (6) concerning time limits. [Re Order No. 00-02 effective July 1, 2001]

END INSERT 8-3 (SWB)

INSERT 9-3 (SWB)

8 **SECTION 30. Nonstatutory provisions.**

9 (1) INTERVENTION BY ASSEMBLY, SENATE, AND JOINT COMMITTEE ON LEGISLATIVE
10 ORGANIZATION. The assembly, senate, and joint committee on legislative organization
11 may intervene as permitted under s. 803.09 (2m) in any litigation pending in state
12 or federal court on the effective date of this subsection. If the joint committee on
13 legislative organization intervenes and appoints special counsel to represent state
14 defendants as set forth under s. 806.04 (11) or 893.825, the attorney general shall
15 notify the court of the substitution of counsel by special counsel appointed by the joint
16 committee on legislative organization to represent the state defendants and may not
17 participate in the action.

END INSERT 9-3 (SWB)



p7 - from Steve

① Expand -- not just constitutionality
but other claims of violating
fed law or preempted

② May intervene AT ANY TIME -
(p. 7, lines 8-10 end)

③ Treat 165.25 (1) to minor (1m)

JCLC

④ Intervenes -- AG may not participate



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-6021/P7
SWB/RAC/CMH:all

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 **AN ACT to renumber and amend** 165.08; **to amend** 165.10, 165.25 (1m), 165.25
2 (6) (a), 806.04 (11), 809.13 and subchapter VIII (title) of chapter 893 [precedes
3 893.80]; and **to create** 13.365, 165.07, 803.09 (2m) and 893.825 of the statutes;
4 **relating to:** notice to the legislature of claims relating to constitutionality of
5 statutes and right of the legislature to intervene and state settlement moneys
6 and the settlement authority of the attorney general.

or enforceability

Analysis by the Legislative Reference Bureau

**Notice to legislature of claims relating to constitutionality of statutes;
legislative intervention**

This bill requires a party that alleges that a statute is unconstitutional to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757

Violation of
or in conflict with
or preempted
by
federal
law

(1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

State settlement moneys and settlement authority of attorney general

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action
2 challenges in state or federal court the constitutionality of a statute, facially or as
3 applied, as part of a claim or affirmative defense:

4 (1) The committee on assembly organization may intervene *at any time* in the action on
5 behalf of the assembly. The committee on assembly organization may obtain legal
6 counsel other than from the department of justice, with the cost of representation
7 paid from the appropriation under s. 20.765 (1) (a), to represent the assembly in any
8 action in which the assembly intervenes.

9 (2) The committee on senate organization may intervene *at any time* in the action on behalf
10 of the senate. The committee on senate organization may obtain legal counsel other
11 than from the department of justice, with the cost of representation paid from the
12 appropriation under s. 20.765 (1) (b), to represent the senate in any action in which
13 the senate intervenes.

14 (3) The joint committee on legislative organization may intervene *at any time* in the action
15 on behalf of the state. The joint committee on legislative organization may obtain
16 legal counsel other than from the department of justice, with the cost of
17 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as
18 determined by the cochairpersons, to represent the state in any action in which the
19 joint committee on legislative organization intervenes.

20 *Insert* **SECTION 2.** 165.07 of the statutes is created to read:

21 **165.07 Intervention by joint committee on legislative organization.** If
22 the joint committee on legislative organization intervenes in an action in state or
23 federal court as permitted under s. 803.09 (2m), the attorney general shall notify the
24 court of the substitution of counsel by special counsel appointed by the joint
25 committee on legislative organization and may not participate in the action.

1 ~~INS 4-13~~ → SECTION 3. 165.08 of the statutes is renumbered 165.08 (1) and amended to
2 read:

3 165.08 (1) Any civil action prosecuted by the department by direction of any
4 officer, department, board, or commission, shall be compromised or discontinued
5 when so directed by such officer, department, board, or commission.

6 (2) Any civil action prosecuted by the department on the initiative of the
7 attorney general, or at the request of any individual may be compromised or
8 discontinued with the approval of the governor by submitting a proposed plan to the
9 joint committee on finance for the approval of the committee. The compromise or
10 discontinuance may occur only if the joint committee on finance approves the
11 proposed plan. No proposed plan may be submitted to the joint committee on finance
12 if the plan concedes the unconstitutionality or other invalidity of a statute, facially
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14 (3) In any criminal action prosecuted by the attorney general, the department
15 shall have the same powers with reference to such action as are vested in district
16 attorneys.

17 SECTION 4. 165.10 of the statutes is amended to read:

18 165.10 ~~Limits on expenditure~~ **Deposit of discretionary settlement**
19 **funds.** Notwithstanding s. 20.455 (3), before the The attorney general may expend
20 shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed
21 under the terms of the settlement, the attorney general shall submit to the joint
22 committee on finance a proposed plan for the expenditure of the funds. If the
23 cochairpersons of the committee do not notify the attorney general within 14 working
24 days after the submittal that the committee has scheduled a meeting for the purpose
25 of reviewing the proposed plan, the attorney general may expend the funds to

as created by 2017 Wisconsin Act 59

1 ~~implement the proposed plan. If, within 14 working days after the submittal, the~~
2 ~~cochairpersons of the committee notify the attorney general that the committee has~~
3 ~~scheduled a meeting for the purpose of reviewing the proposed plan, the attorney~~
4 ~~general may expend the funds only to implement the plan as approved by the~~
5 ~~committee into the general fund.~~

6 **SECTION 5.** 165.25 (1m) of the statutes is amended to read:

7 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If the joint committee on
8 legislative organization does not intervene as permitted under s. 803.09 (2m), if
9 requested by the governor or either house of the legislature, appear for and represent
10 the state, any state department, agency, official, employee or agent, whether
11 required to appear as a party or witness in any civil or criminal matter, and prosecute
12 or defend in any court or before any officer, any cause or matter, civil or criminal, in
13 which the state or the people of this state may be interested. ^{INS 5-13} The public service
14 commission may request under s. 196.497 (7) that the attorney general intervene in
15 federal proceedings. All expenses of the proceedings shall be paid from the
16 appropriation under s. 20.455 (1) (d).

17 **SECTION 6.** 165.25 (6) (a) of the statutes is ^{renumbered 165.25 (6) (a)} amended to read: ^{and}

18 165.25 (6) (a) ~~At 10~~ Except as provided in s. 893.825 (2), at the request of the
19 head of any department of state government, the attorney general may appear for
20 and defend any state department, or any state officer, employee, or agent of the
21 department in any civil action or other matter brought before a court or an
22 administrative agency which is brought against the state department, or officer,
23 employee, or agent for or on account of any act growing out of or committed in the
24 lawful course of an officer's, employee's, or agent's duties. Witness fees or other

1 expenses determined by the attorney general to be reasonable and necessary to the
2 defense in the action or proceeding shall be paid as provided for in s. 885.07.

3 ^{mg} ^g 2. The attorney general may compromise and settle the action as the attorney
4 general determines to be in the best interest of the state except that, if the action is
5 for injunctive relief or there is a proposed consent decree, the attorney general may
6 not compromise or settle the action without first submitting a proposed plan to the
7 joint committee on finance. If, within 14 working days after the plan is submitted,
8 the cochairpersons of the committee notify the attorney general that the committee
9 has scheduled a meeting for the purpose of reviewing the proposed plan, the attorney
10 general may compromise or settle the action only with the approval of the committee.
11 The attorney general may not submit a proposed plan to the joint committee on
12 finance under this subdivision in which the plan concedes the unconstitutionality or
13 other invalidity of a statute, facially or as applied without the approval of the joint
14 committee on legislative organization. ^{INS 6-13}

15 2 3. Members, officers, and employees of the Wisconsin state agencies building
16 corporation and the Wisconsin state public building corporation are covered by this
17 section. Members of the board of governors created under s. 619.04 (3), members of
18 a committee or subcommittee of that board of governors, members of the injured
19 patients and families compensation fund peer review council created under s.
20 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are
21 covered by this section with respect to actions, claims, or other matters arising
22 before, on, or after April 25, 1990. The attorney general may compromise and settle
23 claims asserted before such actions or matters formally are brought or may delegate
24 such authority to the department of administration. This paragraph may not be

1 construed as a consent to sue the state or any department thereof or as a waiver of
2 state sovereign immunity.

3 **SECTION 7.** 803.09 (2m) of the statutes is created to read:

4 **803.09 (2m)** When a party to an action challenges in state or federal court the
5 constitutionality of a statute, facially or as applied, as part of a claim or affirmative
6 defense, the assembly, the senate, and the state legislature may intervene ^{at any time} in the
7 action as a matter of right by serving a motion upon the parties as provided in s.
8 801.14. For purposes of this subsection, a motion to intervene shall be considered
9 timely if it is filed within 45 days of receiving service under s. 806.04 (11) or 893.825
10 or if no service has been made under s. 806.04 (11) or 893.825.

11 **SECTION 8.** 806.04 (11) of the statutes is amended to read:

12 **806.04 (11) PARTIES.** When declaratory relief is sought, all persons shall be
13 made parties who have or claim any interest which would be affected by the
14 declaration, and no declaration may prejudice the right of persons not parties to the
15 proceeding. In any proceeding which involves the validity of a municipal ordinance
16 or franchise, the municipality shall be made a party, and shall be entitled to be heard.

17 If a statute, ordinance or franchise is alleged to be unconstitutional, ^{INS 7-17} the attorney
18 general shall also be served with a copy of the proceeding and, except as provided
19 under this subsection, be entitled to be heard. If a statute is alleged to be
20 unconstitutional, the speaker of the assembly, the president of the senate, and the
21 senate majority leader shall also be served with a copy of the proceeding and the
22 assembly, the senate, and the state legislature are entitled to be heard. If the
23 assembly, the senate, or the joint committee on legislative organization intervenes
24 as provided under s. 803.09 (2m), the assembly shall represent the assembly, the
25 senate shall represent the senate, and the joint committee on legislative

INS 7-20

SECTION 8

1 organization shall represent the state. In an action involving the constitutionality
2 of a statute, if the joint committee on legislative organization determines that the
3 interests of the state will be best represented by special counsel appointed by the
4 legislature, it shall appoint special counsel to represent state defendants and act
5 instead of the attorney general. ³ Special counsel appointed under this subsection
6 shall have the powers of the attorney general with respect to the litigation to which
7 special counsel has been appointed. In any proceeding under this section in which
8 the constitutionality, construction or application of any provision of ch. 227, or of any
9 statute allowing a legislative committee to suspend, or to delay or prevent the
10 adoption of, a rule as defined in s. 227.01 (13) is placed in issue by the parties, the
11 joint committee for review of administrative rules shall be served with a copy of the
12 petition and, with the approval of the joint committee on legislative organization,
13 shall be made a party and be entitled to be heard. In any proceeding under this
14 section in which the constitutionality, construction or application of any provision of
15 ch. 13, 20, 111, 227 or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute
16 allowing a legislative committee to suspend, or to delay or prevent the adoption of,
17 a rule as defined in s. 227.01 (13) is placed in issue by the parties, the joint committee
18 on legislative organization shall be served with a copy of the petition and the joint
19 committee on legislative organization, the senate committee on organization or the
20 assembly committee on organization may intervene as a party to the proceedings and
21 be heard.

22 SECTION 9. 809.13 of the statutes is amended to read:

23 **809.13 Rule (Intervention).** A person who is not a party to an appeal may
24 file in the court of appeals a petition to intervene in the appeal. A party may file a
25 response to the petition within 11 days after service of the petition. The court may

grant the petition upon a showing that the petitioner's interest meets the requirements of s. 803.09 (1) ~~or~~, (2), or (2m).

SECTION 10. Subchapter VIII (title) of chapter 893 [precedes 893.80] of the statutes is amended to read:

CHAPTER 893

SUBCHAPTER VIII

CLAIMS AGAINST GOVERNMENTAL BODIES, OFFICERS AND EMPLOYEES:

~~CONSTITUTIONAL CLAIMS~~

SECTION 11. 893.825 of the statutes is created to read:

893.825 Claim alleging a statute is unconstitutional. (1) ^{Actions} If a statute is alleged to be unconstitutional, the attorney general shall be served with a copy of the proceeding and, except as provided in sub. (2), is entitled to represent the state and be heard.

(2) ^{In an action in which} If a statute is alleged to be unconstitutional, the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding and the assembly, the senate, and the joint committee on legislative organization are entitled to be heard. ^{INS 9-11} ~~If the assembly, the senate, or the~~

joint committee on legislative organization intervenes as provided under s. 803.09 (2m), the assembly shall represent the assembly, the senate shall represent the senate, and the joint committee on legislative organization shall represent the state.

In an action involving the constitutionality of a statute, if the joint committee on legislative organization determines that the interests of the state will be best represented by special counsel appointed by the legislature, it shall appoint special counsel to represent state defendants and act instead of the attorney general

at any time

and the attorney general may not participate

ACTIONS
REGARDING A
STATUTE
IS
UNCONSTITUTIONAL
OR
OTHERWISE
INVALID

OTHER
CLAIMS
ON
INVALIDITY

INS 9-11

INS 9-12

INS 9-15

INS 9-22

INS
INS 9-22

1 Special counsel appointed under this subsection shall have the powers of the
2 attorney general with respect to the litigation to which special counsel has been
3 appointed.

4 **SECTION 12. Nonstatutory provisions.**

5 (1) INTERVENTION BY ASSEMBLY, SENATE, AND JOINT COMMITTEE ON LEGISLATIVE
6 ORGANIZATION. The assembly, senate, and joint committee on legislative organization
7 may intervene as permitted under s. 803.09 (2m) in any litigation pending in state
8 or federal court on the effective date of this subsection. If the joint committee on
9 legislative organization intervenes and appoints special counsel to represent state
10 defendants as set forth under s. 806.04 (11) or 893.825, the attorney general shall
11 notify the court of the substitution of counsel by special counsel appointed by the joint
12 committee on legislative organization to represent the state defendants and may not
13 participate in the action.

14 **SECTION 13. Fiscal changes.**

15 (1) SETTLEMENT FUNDS. Notwithstanding s. 20.001 (3) (c), from the
16 appropriation account under s. 20.455 (3) (g), on the effective date of this subsection,
17 there is lapsed to the general fund the unencumbered balance of any settlement
18 funds in that appropriation account, as determined by the attorney general.

19 (END)

**2019-2020 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P8ins
SWB/RAC/CMH:all

1 Insert 3-3

2 or challenges a statute as violating or preempted by federal law,

4 Insert 4-13

5 or concedes that a statute violates or is preempted by federal law,

7 Insert 5-6

8 **SECTION 1.** 165.25 (1) of the statutes is amended to read:

9 165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in
10 ss. 5.05 (2m) (a), 19.49 (2) (a), and 978.05 (5), if the joint committee on legislative
11 organization does not intervene as permitted under s. 803.09 (2m), appear for the
12 state and prosecute or defend all actions and proceedings, civil or criminal, in the
13 court of appeals and the supreme court, in which the state is interested or a party,
14 and attend to and prosecute or defend all civil cases sent or remanded to any circuit
15 court in which the state is a party. ~~Nothing~~ The joint committee on legislative
16 organization may intervene as permitted under s. 803.09 (2m) at any time, and if the
17 committee intervenes, the attorney general shall notify the court of the substitution
18 of counsel by special counsel appointed by the committee to represent the state and
19 may not participate in the action, proceeding, or case. Unless the joint committee
20 intervenues as permitted under s. 803.09 (2m), nothing in this subsection deprives or
21 relieves the attorney general or the department of justice of any authority or duty
22 under this chapter.

History: 1971 c. 125 s. 522 (1); 1971 c. 215; 1973 c. 333; 1975 c. 81, 199; 1977 c. 29 s. 1656 (27); 1977 c. 187, 260, 273, 344; 1981 c. 20, 62, 96; 1983 a. 27; 1983 a. 36 s. 96 (2), (3), (4); 1983 a. 192; 1985 a. 29, 66; 1987 a. 416; 1989 a. 31, 115, 187, 206, 359; 1991 a. 25, 39, 269; 1993 a. 27, 28, 365; 1995 a. 27 ss. 4453 to 4454m, 9126 (19); 1995 a. 201; 1997 a. 27, 141; 2001 a. 16; 2003 a. 111, 235; 2005 a. 96, 458; 2007 a. 1; 2007 a. 20 ss. 2904, 9121 (6) (a); 2007 a. 76, 79, 96, 130, 225; 2009 a. 2, 28, 42; 2011 a. 32, 35; 2013 a. 20 ss. 164, 166, 167, 180, 1904m; 2013 a. 166 s. 76; 2013 a. 173, 223, 241; 2015 a. 55, 118; 2017 a. 59, 261, 337.

*in any other
matter*

*on legislative
organization*

1 Insert 5-13

2 The joint committee on legislative organization may intervene as permitted
3 under s. 803.09 (2m) at any time, and if the committee intervenes, the attorney
4 general shall notify the court of the substitution of counsel by special counsel
5 appointed by the committee to represent the state and may not participate in the
6 cause or matter.

7
8 Insert 6-13

9 or concedes that a statute violates or is preempted by federal law,

10
11 Insert 7-5

12 or challenges a statute as violating or preempted by federal law,

13
14 Insert 7-17

15 or to be in violation of or preempted by federal law,

16
17 Insert 7-20

18 or to be in violation of or preempted by federal law,

19
20 Insert 8-2

21 or challenging a statute as violating or preempted by federal law,

22
23 Insert 9-11

24 **or in violation of or preempted by federal law**

25

1 Insert 9-12
2 ^{to be}
 or in violation of or preempted by federal law,
3 ^

4 Insert 9-15
5 ^{to be}
 or in violation of or preempted by federal law,
6 ^

7 Insert 9-22
8 or challenging a statute as violating or preempted by federal law,
9

**2019-2020 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-6021/P8ins2
SWB/RAC/CMH:all

1
2 **SECTION 1.** 13.56 (2) of the statutes is amended to read:

3 **13.56 (2) PARTICIPATION IN CERTAIN PROCEEDINGS.** The cochairpersons of the joint
4 committee for review of administrative rules or their designated agents shall accept
5 service made under ss. 227.40 (5) and 806.04 (11). If the committee determines that
6 the legislature should be represented in the proceeding, it shall request the joint
7 committee on legislative organization to designate the legislature's representative
8 for intervene in the proceeding as provided under s. 806.04 (11). The costs of
9 participation in the proceeding shall be paid equally from the appropriations under
10 s. 20.765 (1) (a) and (b), except that such costs incurred by the department of justice
11 shall be paid from the appropriation under s. 20.455 (1) (d).

History: 1973 c. 90, 162; 1973 c. 334 s. 58; 1973 c. 336; 1975 c. 224; 1975 c. 414 s. 28; 1977 c. 29, 277, 449; 1979 c. 34 ss. 2qcm, 2102 (32) (b); 1979 c. 270; 1981 c. 253; 1983 a. 27; 1985 a. 182 ss. 1 to 6, 57; 2003 a. 33; 2005 a. 25.

Cross-reference: See s. 227.19 (1) for a statement of legislative policy regarding legislative review of administrative rules. See s. 227.26 for review after promulgation of rules.

12 **SECTION 2.** 13.90 (2) of the statutes is amended to read:

13 **13.90 (2)** The cochairpersons of the joint committee on legislative organization
14 or their designated agent shall accept service made under ^{ss.} ~~s.~~ 806.04 (11). If the
15 committee, the senate organization committee[^] or the assembly organization
16 committee, [↓] determines that the legislature should ~~be represented~~ intervene in the
17 proceeding, ~~that committee shall designate the legislature's representative for the~~
18 ~~proceeding. The~~ as provided under s. 806.04 (11), the costs of participation in the
19 proceeding shall be paid equally from the appropriations under s. 20.765 (1) (a) and
20 (b), except that such costs incurred by the department of justice shall be paid from
21 the appropriation under s. 20.455 (1) (d).

History: 1971 c. 215; 1973 c. 90; 1975 c. 224, 421; 1977 c. 449; 1979 c. 34 ss. 7d to 7s, 2102 (32) (b); 1981 c. 372 s. 18; 1983 a. 27, 308; 1985 a. 29, 332; 1987 a. 27; 1989 a. 31, 359, 366; 1993 a. 52; 1995 a. 27, 162, 417; 1997 a. 27, 237; 1999 a. 4, 29, 81; 2001 a. 16; 2003 a. 33; 2005 a. 25; 2007 a. 20.

INS
INSERT

The

plain



Per discussion w/ Stene

add x-ref in 165.25(6)(a)1. provision to Dactions (806.04(11))
in the added language ["except as provided"]



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-6021/P8
SWB/RAC/CMH:all

2
/PA

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1/11/30
Revised
new plan 20

1 AN ACT *to renumber and amend* 165.08 and 165.25 (6) (a); *to amend* 13.56 (2),
2 13.90 (2), 165.10, 165.25 (1), 165.25 (1m), 806.04 (11), 809.13 and subchapter
3 VIII (title) of chapter 893 [precedes 893.80]; and *to create* 13.365, 165.07,
4 803.09 (2m) and 893.825 of the statutes; **relating to:** notice to the legislature
5 of claims relating to constitutionality or enforceability of statutes and right of
6 the legislature to intervene and state settlement moneys and the settlement
7 authority of the attorney general.

Analysis by the Legislative Reference Bureau

***Notice to legislature of claims relating to constitutionality of statutes;
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional, or in violation of or preempted by federal law, to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory

judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional or in violation of or preempted by federal law.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, or challenges a statute as violating or preempted by federal law, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right at any time to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

State settlement moneys and settlement authority of attorney general

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 13.365 of the statutes is created to read:

2 **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action
3 challenges in state or federal court the constitutionality of a statute, facially or as
4 applied, or challenges a statute as violating or preempted by federal law, as part of
5 a claim or affirmative defense:

6 (1) The committee on assembly organization may intervene at any time in the
7 action on behalf of the assembly. The committee on assembly organization may
8 obtain legal counsel other than from the department of justice, with the cost of
9 representation paid from the appropriation under s. 20.765 (1) (a), to represent the
10 assembly in any action in which the assembly intervenes.

11 (2) The committee on senate organization may intervene at any time in the
12 action on behalf of the senate. The committee on senate organization may obtain
13 legal counsel other than from the department of justice, with the cost of
14 representation paid from the appropriation under s. 20.765 (1) (b), to represent the
15 senate in any action in which the senate intervenes.

16 (3) The joint committee on legislative organization may intervene at any time
17 in the action on behalf of the state. The joint committee on legislative organization
18 may obtain legal counsel other than from the department of justice, with the cost of
19 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as

1 determined by the cochairpersons, to represent the state in any action in which the
2 joint committee on legislative organization intervenes.

3 **SECTION 2.** 13.56 (2) of the statutes is amended to read:

4 13.56 (2) PARTICIPATION IN CERTAIN PROCEEDINGS. The cochairpersons of the joint
5 committee for review of administrative rules or their designated agents shall accept
6 service made under ss. 227.40 (5) and 806.04 (11). If the committee determines that
7 the legislature should be represented in the proceeding, it shall request the joint
8 committee on legislative organization to designate the legislature's representative
9 for intervene in the proceeding as provided under s. 806.04 (11). The costs of
10 participation in the proceeding shall be paid equally from the appropriations under
11 s. 20.765 (1) (a) and (b), except that such costs incurred by the department of justice
12 shall be paid from the appropriation under s. 20.455 (1) (d).

13 **SECTION 3.** 13.90 (2) of the statutes is amended to read:

14 13.90 (2) The cochairpersons of the joint committee on legislative organization
15 or their designated agent shall accept service made under s. ss. 806.04 (11) and
16 893.825 (2). If the committee, the senate organization committee, or the assembly
17 organization committee, determines that the legislature should be represented
18 intervene in the proceeding, that committee shall designate the legislature's
19 representative for the proceeding, as provided under s. 803.09 (2m), the assembly
20 shall represent the assembly, the senate shall represent the senate, and the joint
21 committee on legislative organization shall represent the state. In an action
22 involving the constitutionality of a statute, or challenging a statute as violating or
23 preempted by federal law, if the joint committee on legislative organization
24 determines at any time that the interests of the state will be best represented by
25 special counsel appointed by the legislature, it shall appoint special counsel to

1 represent state defendants and act instead of the attorney general and the attorney
2 general may not participate in the action. Special counsel appointed under this
3 subsection shall have the powers of the attorney general with respect to the litigation
4 to which special counsel has been appointed. The costs of participation in the
5 proceeding shall be paid equally from the appropriations under s. 20.765 (1) (a) and
6 (b), except that such costs incurred by the department of justice shall be paid from
7 the appropriation under s. 20.455 (1) (d).

8 **SECTION 4.** 165.07 of the statutes is created to read:

9 **165.07 Intervention by joint committee on legislative organization.** If
10 the joint committee on legislative organization intervenes in an action in state or
11 federal court as permitted under s. 803.09 (2m), the attorney general shall notify the
12 court of the substitution of counsel by special counsel appointed by the joint
13 committee on legislative organization and may not participate in the action.

14 **SECTION 5.** 165.08 of the statutes is renumbered 165.08 (1) and amended to
15 read:

16 165.08 (1) Any civil action prosecuted by the department by direction of any
17 officer, department, board, or commission, shall be compromised or discontinued
18 when so directed by such officer, department, board, or commission.

19 **(2)** Any civil action prosecuted by the department on the initiative of the
20 attorney general, or at the request of any individual may be compromised or
21 discontinued with the approval of the governor by submitting a proposed plan to the
22 joint committee on finance for the approval of the committee. The compromise or
23 discontinuance may occur only if the joint committee on finance approves the
24 proposed plan. No proposed plan may be submitted to the joint committee on finance
25 if the plan concedes the unconstitutionality or other invalidity of a statute, facially

1 or as applied, or concedes that a statute violates or is preempted by federal law,
2 without the approval of the joint committee on legislative organization.

3 (3) In any criminal action prosecuted by the attorney general, the department
4 shall have the same powers with reference to such action as are vested in district
5 attorneys.

6 SECTION 6. 165.10 of the statutes, as created by 2017 Wisconsin Act 59, is
7 amended to read:

8 **165.10 Limits on expenditure Deposit of discretionary settlement**
9 **funds.** Notwithstanding s. 20.455 (3), before the The attorney general may expend
10 shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed
11 under the terms of the settlement, the attorney general shall submit to the joint
12 committee on finance a proposed plan for the expenditure of the funds. If the
13 cochairpersons of the committee do not notify the attorney general within 14 working
14 days after the submittal that the committee has scheduled a meeting for the purpose
15 of reviewing the proposed plan, the attorney general may expend the funds to
16 implement the proposed plan. If, within 14 working days after the submittal, the
17 cochairpersons of the committee notify the attorney general that the committee has
18 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney
19 general may expend the funds only to implement the plan as approved by the
20 committee into the general fund.

21 SECTION 7. 165.25 (1) of the statutes is amended to read:

22 165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in
23 ss. 5.05 (2m) (a), 19.49 (2) (a), and 978.05 (5), if the joint committee on legislative
24 organization does not intervene as permitted under s. 803.09 (2m), appear for the
25 state and prosecute or defend all actions and proceedings, civil or criminal, in the

1 court of appeals and the supreme court, in which the state is interested or a party,
2 and attend to and prosecute or defend all civil cases sent or remanded to any circuit
3 court in which the state is a party. Nothing The joint committee on legislative
4 organization may intervene as permitted under s. 803.09 (2m) at any time, and if the
5 committee intervenes, the attorney general shall notify the court of the substitution
6 of counsel by special counsel appointed by the committee to represent the state and
7 may not participate in the action, proceeding, or case. Unless the joint committee on
8 legislative organization intervenes as permitted under s. 803.09 (2m), nothing in this
9 subsection deprives or relieves the attorney general or the department of justice of
10 any authority or duty under this chapter in any other matter.

11 **SECTION 8.** 165.25 (1m) of the statutes is amended to read:

12 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If the joint committee on
13 legislative organization does not intervene as permitted under s. 803.09 (2m), if
14 requested by the governor or either house of the legislature, appear for and represent
15 the state, any state department, agency, official, employee or agent, whether
16 required to appear as a party or witness in any civil or criminal matter, and prosecute
17 or defend in any court or before any officer, any cause or matter, civil or criminal, in
18 which the state or the people of this state may be interested. The joint committee on
19 legislative organization may intervene as permitted under s. 803.09 (2m) at any
20 time, and if the committee intervenes, the attorney general shall notify the court of
21 the substitution of counsel by special counsel appointed by the committee to
22 represent the state and may not participate in the cause or matter. The public service
23 commission may request under s. 196.497 (7) that the attorney general intervene in
24 federal proceedings. All expenses of the proceedings shall be paid from the
25 appropriation under s. 20.455 (1) (d).

SECTION 9. 165.25 (6) (a) of the statutes is renumbered 165.25 (6) (a) 1. and amended to read:

165.25 (6) (a) 1. At ^{ss. 806.04(1) and} ~~Except as provided in § 893.825 (2),~~ at the request of the head of any department of state government, the attorney general may appear for and defend any state department, or any state officer, employee, or agent of the department in any civil action or other matter brought before a court or an administrative agency which is brought against the state department, or officer, employee, or agent for or on account of any act growing out of or committed in the lawful course of an officer's, employee's, or agent's duties. Witness fees or other expenses determined by the attorney general to be reasonable and necessary to the defense in the action or proceeding shall be paid as provided for in s. 885.07. The attorney general may compromise and settle the action as the attorney general determines to be in the best interest of the state except that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general may not compromise or settle the action without first submitting a proposed plan to the joint committee on finance. If, within 14 working days after the plan is submitted, the cochairpersons of the committee notify the attorney general that the committee has scheduled a meeting for the purpose of reviewing the proposed plan, the attorney general may compromise or settle the action only with the approval of the committee. The attorney general may not submit a proposed plan to the joint committee on finance under this subdivision in which the plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal law, without the approval of the joint committee on legislative organization.

1 2. Members, officers, and employees of the Wisconsin state agencies building
2 corporation and the Wisconsin state public building corporation are covered by this
3 section. Members of the board of governors created under s. 619.04 (3), members of
4 a committee or subcommittee of that board of governors, members of the injured
5 patients and families compensation fund peer review council created under s.
6 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are
7 covered by this section with respect to actions, claims, or other matters arising
8 before, on, or after April 25, 1990. The attorney general may compromise and settle
9 claims asserted before such actions or matters formally are brought or may delegate
10 such authority to the department of administration. This paragraph may not be
11 construed as a consent to sue the state or any department thereof or as a waiver of
12 state sovereign immunity.

13 **SECTION 10.** 803.09 (2m) of the statutes is created to read:

14 803.09 (2m) When a party to an action challenges in state or federal court the
15 constitutionality of a statute, facially or as applied, or challenges a statute as
16 violating or preempted by federal law, as part of a claim or affirmative defense, the
17 assembly, the senate, and the state legislature may intervene at any time in the
18 action as a matter of right by serving a motion upon the parties as provided in s.
19 801.14.

20 **SECTION 11.** 806.04 (11) of the statutes is amended to read:

21 806.04 (11) PARTIES. When declaratory relief is sought, all persons shall be
22 made parties who have or claim any interest which would be affected by the
23 declaration, and no declaration may prejudice the right of persons not parties to the
24 proceeding. In any proceeding which involves the validity of a municipal ordinance
25 or franchise, the municipality shall be made a party, and shall be entitled to be heard.

1 If a statute, ordinance or franchise is alleged to be unconstitutional, or to be in
2 violation of or preempted by federal law, the attorney general shall also be served
3 with a copy of the proceeding and, except as provided under this subsection, be
4 entitled to be heard. If a statute is alleged to be unconstitutional, or to be in violation
5 of or preempted by federal law, the speaker of the assembly, the president of the
6 senate, and the senate majority leader shall also be served with a copy of the
7 proceeding, and the assembly, the senate, and the state legislature are entitled to be
8 heard. If the assembly, the senate, or the joint committee on legislative organization
9 intervenes as provided under s. 803.09 (2m), the assembly shall represent the
10 assembly, the senate shall represent the senate, and the joint committee on
11 legislative organization shall represent the state. In an action involving the
12 constitutionality of a statute, or challenging a statute as violating or preempted by
13 federal law, if the joint committee on legislative organization determines at any time
14 that the interests of the state will be best represented by special counsel appointed
15 by the legislature, it shall appoint special counsel to represent state defendants and
16 act instead of the attorney general and the attorney general may not participate in
17 the action. Special counsel appointed under this subsection shall have the powers
18 of the attorney general with respect to the litigation to which special counsel has been
19 appointed. In any proceeding under this section in which the constitutionality,
20 construction or application of any provision of ch. 227, or of any statute allowing a
21 legislative committee to suspend, or to delay or prevent the adoption of, a rule as
22 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for
23 review of administrative rules shall be served with a copy of the petition and, with
24 the approval of the joint committee on legislative organization, shall be made a party
25 and be entitled to be heard. ~~In any proceeding under this section in which the~~

1 ~~constitutionality, construction or application of any provision of ch. 13, 20, 111, 227~~
2 ~~or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a~~
3 ~~legislative committee to suspend, or to delay or prevent the adoption of, a rule as~~
4 ~~defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on~~
5 ~~legislative organization shall be served with a copy of the petition and the joint~~
6 ~~committee on legislative organization, the senate committee on organization or the~~
7 ~~assembly committee on organization may intervene as a party to the proceedings and~~
8 ~~be heard.~~

9 **SECTION 12.** 809.13 of the statutes is amended to read:

10 **809.13 Rule (Intervention).** A person who is not a party to an appeal may
11 file in the court of appeals a petition to intervene in the appeal. A party may file a
12 response to the petition within 11 days after service of the petition. The court may
13 grant the petition upon a showing that the petitioner's interest meets the
14 requirements of s. 803.09 (1) ~~or, (2), or (2m).~~

15 **SECTION 13.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the
16 statutes is amended to read:

17 **CHAPTER 893**

18 **SUBCHAPTER VIII**

19 **CLAIMS AGAINST GOVERNMENTAL**

20 **BODIES, OFFICERS AND EMPLOYEES;**

21 **ACTIONS ALLEGING A STATUTE IS**

22 **UNCONSTITUTIONAL OR**

23 **OTHERWISE INVALID**

24 **SECTION 14.** 893.825 of the statutes is created to read:

1 **893.825 Actions alleging a statute is unconstitutional or in violation of**
2 **or preempted by federal law.** (1) In an action in which a statute is alleged to be
3 unconstitutional, or to be in violation of or preempted by federal law, the attorney
4 general shall be served with a copy of the proceeding and, except as provided in sub.
5 (2), is entitled to represent the state and be heard.

6 (2) In an action in which a statute is alleged to be unconstitutional, or to be in
7 violation of or preempted by federal law, the speaker of the assembly, the president
8 of the senate, and the senate majority leader shall also be served with a copy of the
9 proceeding and the assembly, the senate, and the joint committee on legislative
10 organization are entitled to be heard.

11 **SECTION 15. Nonstatutory provisions.**

12 (1) INTERVENTION BY ASSEMBLY, SENATE, AND JOINT COMMITTEE ON LEGISLATIVE
13 ORGANIZATION. The assembly, senate, and joint committee on legislative organization
14 may intervene as permitted under s. 803.09 (2m) in any litigation pending in state
15 or federal court on the effective date of this subsection. If the joint committee on
16 legislative organization intervenes and appoints special counsel to represent state
17 defendants as set forth under s. 806.04 (11) or 893.825, the attorney general shall
18 notify the court of the substitution of counsel by special counsel appointed by the joint
19 committee on legislative organization to represent the state defendants and may not
20 participate in the action.

21 **SECTION 16. Fiscal changes.**

22 (1) SETTLEMENT FUNDS. Notwithstanding s. 20.001 (3) (c), from the
23 appropriation account under s. 20.455 (3) (g), on the effective date of this subsection,

there is lapsed to the general fund the unencumbered balance of any settlement
funds in that appropriation account, as determined by the attorney general.

(END)



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-6021/P9
SWB/RAC/CMH:all

P10

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 **AN ACT** *to renumber and amend* 165.08 and 165.25 (6) (a); *to amend* 13.56 (2),
2 13.90 (2), 165.10, 165.25 (1), 165.25 (1m), 806.04 (11), 809.13 and subchapter
3 VIII (title) of chapter 893 [precedes 893.80]; and *to create* 13.365, 165.07,
4 803.09 (2m) and 893.825 of the statutes; **relating to:** notice to the legislature
5 of claims relating to constitutionality or enforceability of statutes and right of
6 the legislature to intervene and state settlement moneys and the settlement
7 authority of the attorney general.

Analysis by the Legislative Reference Bureau

***Notice to legislature of claims relating to constitutionality of statutes;
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional, or in violation of or preempted by federal law, to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory

judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional or in violation of or preempted by federal law.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, or challenges a statute as violating or preempted by federal law, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right at any time to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

State settlement moneys and settlement authority of attorney general

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 13.365 of the statutes is created to read:

2 **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action
3 challenges in state or federal court the constitutionality of a statute, facially or as
4 applied, or challenges a statute as violating or preempted by federal law, as part of
5 a claim or affirmative defense:

6 (1) The committee on assembly organization may intervene at any time in the
7 action on behalf of the assembly. The committee on assembly organization may
8 obtain legal counsel other than from the department of justice, with the cost of
9 representation paid from the appropriation under s. 20.765 (1) (a), to represent the
10 assembly in any action in which the assembly intervenes.

11 (2) The committee on senate organization may intervene at any time in the
12 action on behalf of the senate. The committee on senate organization may obtain
13 legal counsel other than from the department of justice, with the cost of
14 representation paid from the appropriation under s. 20.765 (1) (b), to represent the
15 senate in any action in which the senate intervenes.

16 (3) The joint committee on legislative organization may intervene at any time
17 in the action on behalf of the state. The joint committee on legislative organization
18 may obtain legal counsel other than from the department of justice, with the cost of
19 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as

1 determined by the cochairpersons, to represent the state in any action in which the
2 joint committee on legislative organization intervenes.

3 **SECTION 2.** 13.56 (2) of the statutes is amended to read:

4 13.56 (2) PARTICIPATION IN CERTAIN PROCEEDINGS. The cochairpersons of the joint
5 committee for review of administrative rules or their designated agents shall accept
6 service made under ss. 227.40 (5) and 806.04 (11). If the committee determines that
7 the legislature should be represented in the proceeding, it shall request the joint
8 committee on legislative organization to designate the legislature's representative
9 for intervene in the proceeding as provided under s. 806.04 (11). The costs of
10 participation in the proceeding shall be paid equally from the appropriations under
11 s. 20.765 (1) (a) and (b), except that such costs incurred by the department of justice
12 shall be paid from the appropriation under s. 20.455 (1) (d).

13 **SECTION 3.** 13.90 (2) of the statutes is amended to read:

14 13.90 (2) The cochairpersons of the joint committee on legislative organization
15 or their designated agent shall accept service made under ~~s. ss.~~ 806.04 (11) and
16 893.825 (2). If the committee, the senate organization committee, or the assembly
17 organization committee, determines that the legislature should ~~be represented~~
18 intervene in the proceeding, ~~that committee shall designate the legislature's~~
19 representative for the proceeding. as provided under s. 803.09 (2m), the assembly
20 shall represent the assembly, the senate shall represent the senate, and the joint
21 committee on legislative organization shall represent the state. In an action
22 involving the constitutionality of a statute, or challenging a statute as violating or
23 preempted by federal law, if the joint committee on legislative organization
24 determines at any time that the interests of the state will be best represented by
25 special counsel appointed by the legislature, it shall appoint special counsel to

1 represent state defendants and act instead of the attorney general and the attorney
2 general may not participate in the action. Special counsel appointed under this
3 subsection shall have the powers of the attorney general with respect to the litigation
4 to which special counsel has been appointed. The costs of participation in the
5 proceeding shall be paid equally from the appropriations under s. 20.765 (1) (a) and
6 (b), except that such costs incurred by the department of justice shall be paid from
7 the appropriation under s. 20.455 (1) (d).

8 **SECTION 4.** 165.07 of the statutes is created to read:

9 **165.07 Intervention by joint committee on legislative organization.** If
10 the joint committee on legislative organization intervenes in an action in state or
11 federal court as permitted under s. 803.09 (2m), the attorney general shall notify the
12 court of the substitution of counsel by special counsel appointed by the joint
13 committee on legislative organization and may not participate in the action.

14 **SECTION 5.** 165.08 of the statutes is renumbered 165.08 (1) and amended to
15 read:

16 165.08 (1) Any civil action prosecuted by the department by direction of any
17 officer, department, board, or commission, ~~shall be compromised or discontinued~~
18 ~~when so directed by such officer, department, board, or commission.~~

19 ^{or amend}
~~Any~~ ^{NP} (2) ^e civil action prosecuted by the department on the initiative of the
20 attorney general, or at the request of any individual may be compromised or
21 discontinued with the approval of the governor ^{only} by ~~submitting~~ ^{submission of} a proposed plan to the
22 joint committee on finance for the approval of the committee. The compromise or
23 discontinuance may occur only if the joint committee on finance approves the
24 proposed plan. No proposed plan may be submitted to the joint committee on finance
25 if the plan concedes the unconstitutionality or other invalidity of a statute, facially

1 or as applied, or concedes that a statute violates or is preempted by federal law,
2 without the approval of the joint committee on legislative organization.

3 ⁽²⁾
3 ⁽³⁾ In any criminal action prosecuted by the attorney general, the department
4 shall have the same powers with reference to such action as are vested in district
5 attorneys.

6 SECTION 6. 165.10 of the statutes, as created by 2017 Wisconsin Act 59, is
7 amended to read:

8 **165.10 Limits on expenditure Deposit of discretionary settlement**
9 **funds.** Notwithstanding s. 20.455 (3), before the The attorney general may expend
10 shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed
11 under the terms of the settlement, the attorney general shall submit to the joint
12 committee on finance a proposed plan for the expenditure of the funds. If the
13 cochairpersons of the committee do not notify the attorney general within 14 working
14 days after the submittal that the committee has scheduled a meeting for the purpose
15 of reviewing the proposed plan, the attorney general may expend the funds to
16 implement the proposed plan. If, within 14 working days after the submittal, the
17 cochairpersons of the committee notify the attorney general that the committee has
18 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney
19 general may expend the funds only to implement the plan as approved by the
20 committee into the general fund.

21 SECTION 7. 165.25 (1) of the statutes is amended to read:

22 165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in
23 ss. 5.05 (2m) (a), 19.49 (2) (a), and 978.05 (5), if the joint committee on legislative
24 organization does not intervene as permitted under s. 803.09 (2m), appear for the
25 state and prosecute or defend all actions and proceedings, civil or criminal, in the

1 court of appeals and the supreme court, in which the state is interested or a party,
2 and attend to and prosecute or defend all civil cases sent or remanded to any circuit
3 court in which the state is a party. ~~Nothing~~ The joint committee on legislative
4 organization may intervene as permitted under s. 803.09 (2m) at any time, and if the
5 committee intervenes, the attorney general shall notify the court of the substitution
6 of counsel by special counsel appointed by the committee to represent the state and
7 may not participate in the action, proceeding, or case. Unless the joint committee on
8 legislative organization intervenes as permitted under s. 803.09 (2m), nothing in this
9 subsection deprives or relieves the attorney general or the department of justice of
10 any authority or duty under this chapter in any other matter.

11 SECTION 8. 165.25 (1m) of the statutes is amended to read:

12 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If the joint committee on
13 legislative organization does not intervene as permitted under s. 803.09 (2m), if
14 requested by the governor or either house of the legislature, appear for and represent
15 the state, any state department, agency, official, employee or agent, whether
16 required to appear as a party or witness in any civil or criminal matter, and prosecute
17 or defend in any court or before any officer, any cause or matter, civil or criminal, in
18 which the state or the people of this state may be interested. The joint committee on
19 legislative organization may intervene as permitted under s. 803.09 (2m) at any
20 time, and if the committee intervenes, the attorney general shall notify the court of
21 the substitution of counsel by special counsel appointed by the committee to
22 represent the state and may not participate in the cause or matter. The public service
23 commission may request under s. 196.497 (7) that the attorney general intervene in
24 federal proceedings. All expenses of the proceedings shall be paid from the
25 appropriation under s. 20.455 (1) (d).

SECTION 9

1 **SECTION 9.** 165.25 (6) (a) of the statutes is renumbered 165.25 (6) (a) 1. and
2 amended to read:

3 165.25 (6) (a) 1. At Except as provided in ss. 806.04 (11) and 893.825 (2), at the
4 request of the head of any department of state government, the attorney general may
5 appear for and defend any state department, or any state officer, employee, or agent
6 of the department in any civil action or other matter brought before a court or an
7 administrative agency which is brought against the state department, or officer,
8 employee, or agent for or on account of any act growing out of or committed in the
9 lawful course of an officer's, employee's, or agent's duties. Witness fees or other
10 expenses determined by the attorney general to be reasonable and necessary to the
11 defense in the action or proceeding shall be paid as provided for in s. 885.07. The
12 attorney general may compromise and settle the action as the attorney general
13 determines to be in the best interest of the state except that, if the action is for
14 injunctive relief or there is a proposed consent decree, the attorney general may not
15 compromise or settle the action without first submitting a proposed plan to the joint
16 committee on finance. If, within 14 working days after the plan is submitted, the
17 cochairpersons of the committee notify the attorney general that the committee has
18 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney
19 general may compromise or settle the action only with the approval of the committee.
20 The attorney general may not submit a proposed plan to the joint committee on
21 finance under this subdivision in which the plan concedes the unconstitutionality or
22 other invalidity of a statute, facially or as applied, or concedes that a statute violates
23 or is preempted by federal law, without the approval of the joint committee on
24 legislative organization.

1 2. Members, officers, and employees of the Wisconsin state agencies building
2 corporation and the Wisconsin state public building corporation are covered by this
3 section. Members of the board of governors created under s. 619.04 (3), members of
4 a committee or subcommittee of that board of governors, members of the injured
5 patients and families compensation fund peer review council created under s.
6 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are
7 covered by this section with respect to actions, claims, or other matters arising
8 before, on, or after April 25, 1990. The attorney general may compromise and settle
9 claims asserted before such actions or matters formally are brought or may delegate
10 such authority to the department of administration. This paragraph may not be
11 construed as a consent to sue the state or any department thereof or as a waiver of
12 state sovereign immunity.

13 **SECTION 10.** 803.09 (2m) of the statutes is created to read:

14 **803.09 (2m)** When a party to an action challenges in state or federal court the
15 constitutionality of a statute, facially or as applied, or challenges a statute as
16 violating or preempted by federal law, as part of a claim or affirmative defense, the
17 assembly, the senate, and the state legislature may intervene at any time in the
18 action as a matter of right by serving a motion upon the parties as provided in s.
19 801.14.

20 **SECTION 11.** 806.04 (11) of the statutes is amended to read:

21 **806.04 (11) PARTIES.** When declaratory relief is sought, all persons shall be
22 made parties who have or claim any interest which would be affected by the
23 declaration, and no declaration may prejudice the right of persons not parties to the
24 proceeding. In any proceeding which involves the validity of a municipal ordinance
25 or franchise, the municipality shall be made a party, and shall be entitled to be heard.

SECTION 11

1 If a statute, ordinance or franchise is alleged to be unconstitutional, or to be in
2 violation of or preempted by federal law, the attorney general shall also be served
3 with a copy of the proceeding and, except as provided under this subsection, be
4 entitled to be heard. If a statute is alleged to be unconstitutional, or to be in violation
5 of or preempted by federal law, the speaker of the assembly, the president of the
6 senate, and the senate majority leader shall also be served with a copy of the
7 proceeding, and the assembly, the senate, and the state legislature are entitled to be
8 heard. If the assembly, the senate, or the joint committee on legislative organization
9 intervenes as provided under s. 803.09 (2m), the assembly shall represent the
10 assembly, the senate shall represent the senate, and the joint committee on
11 legislative organization shall represent the state. In an action involving the
12 constitutionality of a statute, or challenging a statute as violating or preempted by
13 federal law, if the joint committee on legislative organization determines at any time
14 that the interests of the state will be best represented by special counsel appointed
15 by the legislature, it shall appoint special counsel to represent state defendants and
16 act instead of the attorney general and the attorney general may not participate in
17 the action. Special counsel appointed under this subsection shall have the powers
18 of the attorney general with respect to the litigation to which special counsel has been
19 appointed. In any proceeding under this section in which the constitutionality,
20 construction or application of any provision of ch. 227, or of any statute allowing a
21 legislative committee to suspend, or to delay or prevent the adoption of, a rule as
22 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for
23 review of administrative rules shall be served with a copy of the petition and, with
24 the approval of the joint committee on legislative organization, shall be made a party
25 and be entitled to be heard. ~~In any proceeding under this section in which the~~

1 ~~constitutionality, construction or application of any provision of ch. 13, 20, 111, 227~~
2 ~~or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a~~
3 ~~legislative committee to suspend, or to delay or prevent the adoption of, a rule as~~
4 ~~defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on~~
5 ~~legislative organization shall be served with a copy of the petition and the joint~~
6 ~~committee on legislative organization, the senate committee on organization or the~~
7 ~~assembly committee on organization may intervene as a party to the proceedings and~~
8 ~~be heard.~~

9 **SECTION 12.** 809.13 of the statutes is amended to read:

10 **809.13 Rule (Intervention).** A person who is not a party to an appeal may
11 file in the court of appeals a petition to intervene in the appeal. A party may file a
12 response to the petition within 11 days after service of the petition. The court may
13 grant the petition upon a showing that the petitioner's interest meets the
14 requirements of s. 803.09 (1) ~~or, (2), or (2m).~~

15 **SECTION 13.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the
16 statutes is amended to read:

17 **CHAPTER 893**

18 **SUBCHAPTER VIII**

19 **CLAIMS AGAINST GOVERNMENTAL**
20 **BODIES, OFFICERS AND EMPLOYEES;**

21 **ACTIONS ALLEGING A STATUTE IS**

22 **UNCONSTITUTIONAL OR**

23 **OTHERWISE INVALID**

24 **SECTION 14.** 893.825 of the statutes is created to read:

1 **893.825 Actions alleging a statute is unconstitutional or in violation of**
2 **or preempted by federal law.** (1) In an action in which a statute is alleged to be
3 unconstitutional, or to be in violation of or preempted by federal law, the attorney
4 general shall be served with a copy of the proceeding and, except as provided in sub.
5 (2), is entitled to represent the state and be heard.

6 (2) In an action in which a statute is alleged to be unconstitutional, or to be in
7 violation of or preempted by federal law, the speaker of the assembly, the president
8 of the senate, and the senate majority leader shall also be served with a copy of the
9 proceeding and the assembly, the senate, and the joint committee on legislative
10 organization are entitled to be heard.

11 **SECTION 15. Nonstatutory provisions.**

12 (1) INTERVENTION BY ASSEMBLY, SENATE, AND JOINT COMMITTEE ON LEGISLATIVE
13 ORGANIZATION. The assembly, senate, and joint committee on legislative organization
14 may intervene as permitted under s. 803.09 (2m) in any litigation pending in state
15 or federal court on the effective date of this subsection. If the joint committee on
16 legislative organization intervenes and appoints special counsel to represent state
17 defendants as set forth under s. 806.04 (11) or 893.825, the attorney general shall
18 notify the court of the substitution of counsel by special counsel appointed by the joint
19 committee on legislative organization to represent the state defendants and may not
20 participate in the action.

21 **SECTION 16. Fiscal changes.**

22 (1) SETTLEMENT FUNDS. Notwithstanding s. 20.001 (3) (c), from the
23 appropriation account under s. 20.455 (3) (g), on the effective date of this subsection,

1 there is lapsed to the general fund the unencumbered balance of any settlement

2 funds in that appropriation account, as determined by the attorney general.

3 (END)

RESEARCH APPENDIX

Date Transfer Requested: 11/30/2018 (Per: CMH)

Appendix R ... has been added to the 2017 LRB-6074

Appendix A	LRB 17-5979	Appendix W	LRB 17-6028
Appendix B	LRB 17-5982	Appendix X	LRB 17-6031
Appendix C	LRB 17-5983	Appendix Y	LRB 17-6036
Appendix D	LRB 17-5985	Appendix Z	LRB 17-6037
Appendix E	LRB 17-5986	Appendix AA	LRB 17-6038
Appendix F	LRB 17-5989	Appendix BB	LRB 17-6039
Appendix G	LRB 17-5990	Appendix CC	LRB 17-6040
Appendix H	LRB 17-5995	Appendix DD	LRB 17-6041
Appendix I	LRB 17-5998	Appendix EE	LRB 17-6042
Appendix J	LRB 17-6001	Appendix FF	LRB 17-6043
Appendix K	LRB 17-6004	Appendix GG	LRB 17-6046
Appendix L	LRB 17-6006	Appendix HH	LRB 17-6047
Appendix M	LRB 17-6007	Appendix II	LRB 17-6048
Appendix N	LRB 17-6012	Appendix JJ	LRB 17-6049
Appendix O	LRB 17-6015	Appendix KK	LRB 17-6050
Appendix P	LRB 17-6017	Appendix LL	LRB 17-6051
Appendix Q	LRB 17-6019	Appendix MM	LRB 17-6052
Appendix R	LRB 17-6021	Appendix NN	LRB 17-6058
Appendix S	LRB 17-6023	Appendix OO	LRB 17-6059
Appendix T	LRB 17-6024	Appendix PP	LRB 17-6065
Appendix U	LRB 17-6025	Appendix QQ	LRB 17-6067
Appendix V	LRB 17-6027		



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-6021/P10
SWB/RAC/CMH:all

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 **AN ACT** *to renumber and amend* 165.08 and 165.25 (6) (a); *to amend* 13.56 (2),
2 13.90 (2), 165.10, 165.25 (1), 165.25 (1m), 806.04 (11), 809.13 and subchapter
3 VIII (title) of chapter 893 [precedes 893.80]; and *to create* 13.365, 165.07,
4 803.09 (2m) and 893.825 of the statutes; **relating to:** notice to the legislature
5 of claims relating to constitutionality or enforceability of statutes and right of
6 the legislature to intervene and state settlement moneys and the settlement
7 authority of the attorney general.

Analysis by the Legislative Reference Bureau

***Notice to legislature of claims relating to constitutionality of statutes;
legislative intervention***

This bill requires a party that alleges that a statute is unconstitutional, or in violation of or preempted by federal law, to serve the speaker of the assembly, the president of the senate, and the senate majority leader with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are entitled to be heard, representing the legislature and the state.

Under current law, if a statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general must be served with a copy of the proceeding and be entitled to be heard. This requirement exists in the statutes for declaratory

judgment acts under s. 806.04 (11). The Wisconsin Supreme Court has also extended the requirement to other types of actions involving claims that a statute is unconstitutional. See *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979). This bill incorporates the *Kurtz* rule into the statutes and extends both the current statutory and *Kurtz* requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional or in violation of or preempted by federal law.

The bill also provides that when a party challenges the constitutionality of a statute, facially or as applied, or challenges a statute as violating or preempted by federal law, as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right at any time to intervene and participate in the action and may also retain legal counsel other than the Department of Justice. Under the bill, the Committee on Assembly Organization may intervene in the action, as well as obtain legal counsel, on behalf of the assembly; the Committee on Senate Organization may intervene in the action, as well as obtain legal counsel, on behalf of the senate; and JCLO may intervene in the action, as well as obtain legal counsel, on behalf of the state. If JCLO determines that the interests of the state will be best represented by special counsel appointed by the legislature, JCLO must appoint special counsel to represent the state defendants and act instead of the attorney general. In these circumstances, special counsel has the powers of the attorney general with respect to the litigation to which special counsel has been appointed.

State settlement moneys and settlement authority of attorney general

Under current law, DOJ deposits settlement funds that are not committed under the terms of the settlement into a DOJ appropriation and may spend the funds only after submitting a plan for the expenditure to the Joint Committee on Finance for passive review. If JCF does not schedule a meeting to review the proposed plan within 14 days, DOJ may expend the funds as provided in the plan. This bill requires that DOJ must deposit all settlement funds into the general fund. This bill also lapses all unencumbered settlement funds that are currently in the DOJ appropriation into the general fund.

Current law allows the attorney general to compromise or discontinue an action DOJ is prosecuting if the governor approves the compromise or discontinuance. This bill requires JCF to approve the compromise or discontinuance instead of the governor. Current law allows the attorney general to settle and compromise actions in which the attorney general is appearing for and defending the state as the attorney general determines to be in the best interest of the state. This bill requires that, if the action is for injunctive relief or there is a proposed consent decree, the attorney general must submit the settlement or compromise plan to JCF for passive review. If JCF does not schedule a meeting to review the plan within 14 days, the attorney general may proceed, but, if JCF does schedule a meeting, the attorney general may proceed only with the approval of JCF.

The bill further provides that the attorney general may not submit a proposed settlement plan to JCF in which the plan concedes the unconstitutionality or other invalidity of a statute without the approval of JCLO.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 13.365 of the statutes is created to read:

2 **13.365 Intervention.** Pursuant to s. 803.09 (2m), when a party to an action
3 challenges in state or federal court the constitutionality of a statute, facially or as
4 applied, or challenges a statute as violating or preempted by federal law, as part of
5 a claim or affirmative defense:

6 (1) The committee on assembly organization may intervene at any time in the
7 action on behalf of the assembly. The committee on assembly organization may
8 obtain legal counsel other than from the department of justice, with the cost of
9 representation paid from the appropriation under s. 20.765 (1) (a), to represent the
10 assembly in any action in which the assembly intervenes.

11 (2) The committee on senate organization may intervene at any time in the
12 action on behalf of the senate. The committee on senate organization may obtain
13 legal counsel other than from the department of justice, with the cost of
14 representation paid from the appropriation under s. 20.765 (1) (b), to represent the
15 senate in any action in which the senate intervenes.

16 (3) The joint committee on legislative organization may intervene at any time
17 in the action on behalf of the state. The joint committee on legislative organization
18 may obtain legal counsel other than from the department of justice, with the cost of
19 representation paid from the appropriation under s. 20.765 (1) (a) or (b), as

1 determined by the cochairpersons, to represent the state in any action in which the
2 joint committee on legislative organization intervenes.

3 **SECTION 2.** 13.56 (2) of the statutes is amended to read:

4 13.56 (2) PARTICIPATION IN CERTAIN PROCEEDINGS. The cochairpersons of the joint
5 committee for review of administrative rules or their designated agents shall accept
6 service made under ss. 227.40 (5) and 806.04 (11). If the committee determines that
7 the legislature should be represented in the proceeding, it shall request the joint
8 committee on legislative organization to designate the legislature's representative
9 for intervene in the proceeding as provided under s. 806.04 (11). The costs of
10 participation in the proceeding shall be paid equally from the appropriations under
11 s. 20.765 (1) (a) and (b), except that such costs incurred by the department of justice
12 shall be paid from the appropriation under s. 20.455 (1) (d).

13 **SECTION 3.** 13.90 (2) of the statutes is amended to read:

14 13.90 (2) The cochairpersons of the joint committee on legislative organization
15 or their designated agent shall accept service made under s. ss. 806.04 (11) and
16 893.825 (2). If the committee, the senate organization committee, or the assembly
17 organization committee, determines that the legislature should be represented
18 intervene in the proceeding, that committee shall designate the legislature's
19 representative for the proceeding. as provided under s. 803.09 (2m), the assembly
20 shall represent the assembly, the senate shall represent the senate, and the joint
21 committee on legislative organization shall represent the state. In an action
22 involving the constitutionality of a statute, or challenging a statute as violating or
23 preempted by federal law, if the joint committee on legislative organization
24 determines at any time that the interests of the state will be best represented by
25 special counsel appointed by the legislature, it shall appoint special counsel to

1 represent state defendants and act instead of the attorney general and the attorney
2 general may not participate in the action. Special counsel appointed under this
3 subsection shall have the powers of the attorney general with respect to the litigation
4 to which special counsel has been appointed. The costs of participation in the
5 proceeding shall be paid equally from the appropriations under s. 20.765 (1) (a) and
6 (b), except that such costs incurred by the department of justice shall be paid from
7 the appropriation under s. 20.455 (1) (d).

8 **SECTION 4.** 165.07 of the statutes is created to read:

9 **165.07 Intervention by joint committee on legislative organization.** If
10 the joint committee on legislative organization intervenes in an action in state or
11 federal court as permitted under s. 803.09 (2m), the attorney general shall notify the
12 court of the substitution of counsel by special counsel appointed by the joint
13 committee on legislative organization and may not participate in the action.

14 **SECTION 5.** 165.08 of the statutes is renumbered 165.08 (1) and amended to
15 read:

16 **165.08 (1)** Any civil action prosecuted by the department by direction of any
17 officer, department, board, or commission, ~~shall be compromised or discontinued~~
18 ~~when so directed by such officer, department, board or commission. Any or any civil~~
19 action prosecuted by the department on the initiative of the attorney general, or at
20 the request of any individual may be compromised or discontinued ~~with the approval~~
21 ~~of the governor only by submission of a proposed plan to the joint committee on~~
22 ~~finance for the approval of the committee. The compromise or discontinuance may~~
23 ~~occur only if the joint committee on finance approves the proposed plan. No proposed~~
24 ~~plan may be submitted to the joint committee on finance if the plan concedes the~~
25 ~~unconstitutionality or other invalidity of a statute, facially or as applied, or concedes~~

1 that a statute violates or is preempted by federal law, without the approval of the
2 joint committee on legislative organization.

3 (2) In any criminal action prosecuted by the attorney general, the department
4 shall have the same powers with reference to such action as are vested in district
5 attorneys.

6 SECTION 6. 165.10 of the statutes, as created by 2017 Wisconsin Act 59, is
7 amended to read:

8 **165.10 Limits on expenditure** Deposit of discretionary settlement
9 **funds.** ~~Notwithstanding s. 20.455 (3), before the~~ The attorney general may expend
10 shall deposit all settlement funds under s. 20.455 (3) (g) that are not committed
11 ~~under the terms of the settlement, the attorney general shall submit to the joint~~
12 ~~committee on finance a proposed plan for the expenditure of the funds. If the~~
13 ~~cochairpersons of the committee do not notify the attorney general within 14 working~~
14 ~~days after the submittal that the committee has scheduled a meeting for the purpose~~
15 ~~of reviewing the proposed plan, the attorney general may expend the funds to~~
16 ~~implement the proposed plan. If, within 14 working days after the submittal, the~~
17 ~~cochairpersons of the committee notify the attorney general that the committee has~~
18 ~~scheduled a meeting for the purpose of reviewing the proposed plan, the attorney~~
19 ~~general may expend the funds only to implement the plan as approved by the~~
20 committee into the general fund.

21 SECTION 7. 165.25 (1) of the statutes is amended to read:

22 165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in
23 ss. 5.05 (2m) (a), 19.49 (2) (a), and 978.05 (5), if the joint committee on legislative
24 organization does not intervene as permitted under s. 803.09 (2m), appear for the
25 state and prosecute or defend all actions and proceedings, civil or criminal, in the

1 court of appeals and the supreme court, in which the state is interested or a party,
2 and attend to and prosecute or defend all civil cases sent or remanded to any circuit
3 court in which the state is a party. ~~Nothing~~ The joint committee on legislative
4 organization may intervene as permitted under s. 803.09 (2m) at any time, and if the
5 committee intervenes, the attorney general shall notify the court of the substitution
6 of counsel by special counsel appointed by the committee to represent the state and
7 may not participate in the action, proceeding, or case. Unless the joint committee on
8 legislative organization intervenes as permitted under s. 803.09 (2m), nothing in this
9 subsection deprives or relieves the attorney general or the department of justice of
10 any authority or duty under this chapter in any other matter.

11 **SECTION 8.** 165.25 (1m) of the statutes is amended to read:

12 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If the joint committee on
13 legislative organization does not intervene as permitted under s. 803.09 (2m), if
14 requested by the governor or either house of the legislature, appear for and represent
15 the state, any state department, agency, official, employee or agent, whether
16 required to appear as a party or witness in any civil or criminal matter, and prosecute
17 or defend in any court or before any officer, any cause or matter, civil or criminal, in
18 which the state or the people of this state may be interested. The joint committee on
19 legislative organization may intervene as permitted under s. 803.09 (2m) at any
20 time, and if the committee intervenes, the attorney general shall notify the court of
21 the substitution of counsel by special counsel appointed by the committee to
22 represent the state and may not participate in the cause or matter. The public service
23 commission may request under s. 196.497 (7) that the attorney general intervene in
24 federal proceedings. All expenses of the proceedings shall be paid from the
25 appropriation under s. 20.455 (1) (d).

SECTION 9

1 **SECTION 9.** 165.25 (6) (a) of the statutes is renumbered 165.25 (6) (a) 1. and
2 amended to read:

3 165.25 (6) (a) 1. At Except as provided in ss. 806.04 (11) and 893.825 (2), at the
4 request of the head of any department of state government, the attorney general may
5 appear for and defend any state department, or any state officer, employee, or agent
6 of the department in any civil action or other matter brought before a court or an
7 administrative agency which is brought against the state department, or officer,
8 employee, or agent for or on account of any act growing out of or committed in the
9 lawful course of an officer's, employee's, or agent's duties. Witness fees or other
10 expenses determined by the attorney general to be reasonable and necessary to the
11 defense in the action or proceeding shall be paid as provided for in s. 885.07. The
12 attorney general may compromise and settle the action as the attorney general
13 determines to be in the best interest of the state except that, if the action is for
14 injunctive relief or there is a proposed consent decree, the attorney general may not
15 compromise or settle the action without first submitting a proposed plan to the joint
16 committee on finance. If, within 14 working days after the plan is submitted, the
17 cochairpersons of the committee notify the attorney general that the committee has
18 scheduled a meeting for the purpose of reviewing the proposed plan, the attorney
19 general may compromise or settle the action only with the approval of the committee.
20 The attorney general may not submit a proposed plan to the joint committee on
21 finance under this subdivision in which the plan concedes the unconstitutionality or
22 other invalidity of a statute, facially or as applied, or concedes that a statute violates
23 or is preempted by federal law, without the approval of the joint committee on
24 legislative organization.

1 2. Members, officers, and employees of the Wisconsin state agencies building
2 corporation and the Wisconsin state public building corporation are covered by this
3 section. Members of the board of governors created under s. 619.04 (3), members of
4 a committee or subcommittee of that board of governors, members of the injured
5 patients and families compensation fund peer review council created under s.
6 655.275 (2), and persons consulting with that council under s. 655.275 (5) (b) are
7 covered by this section with respect to actions, claims, or other matters arising
8 before, on, or after April 25, 1990. The attorney general may compromise and settle
9 claims asserted before such actions or matters formally are brought or may delegate
10 such authority to the department of administration. This paragraph may not be
11 construed as a consent to sue the state or any department thereof or as a waiver of
12 state sovereign immunity.

13 **SECTION 10.** 803.09 (2m) of the statutes is created to read:

14 803.09 (2m) When a party to an action challenges in state or federal court the
15 constitutionality of a statute, facially or as applied, or challenges a statute as
16 violating or preempted by federal law, as part of a claim or affirmative defense, the
17 assembly, the senate, and the state legislature may intervene at any time in the
18 action as a matter of right by serving a motion upon the parties as provided in s.
19 801.14.

20 **SECTION 11.** 806.04 (11) of the statutes is amended to read:

21 806.04 (11) PARTIES. When declaratory relief is sought, all persons shall be
22 made parties who have or claim any interest which would be affected by the
23 declaration, and no declaration may prejudice the right of persons not parties to the
24 proceeding. In any proceeding which involves the validity of a municipal ordinance
25 or franchise, the municipality shall be made a party, and shall be entitled to be heard.

SECTION 11

1 If a statute, ordinance or franchise is alleged to be unconstitutional, or to be in
2 violation of or preempted by federal law, the attorney general shall also be served
3 with a copy of the proceeding and, except as provided under this subsection, be
4 entitled to be heard. If a statute is alleged to be unconstitutional, or to be in violation
5 of or preempted by federal law, the speaker of the assembly, the president of the
6 senate, and the senate majority leader shall also be served with a copy of the
7 proceeding, and the assembly, the senate, and the state legislature are entitled to be
8 heard. If the assembly, the senate, or the joint committee on legislative organization
9 intervenes as provided under s. 803.09 (2m), the assembly shall represent the
10 assembly, the senate shall represent the senate, and the joint committee on
11 legislative organization shall represent the state. In an action involving the
12 constitutionality of a statute, or challenging a statute as violating or preempted by
13 federal law, if the joint committee on legislative organization determines at any time
14 that the interests of the state will be best represented by special counsel appointed
15 by the legislature, it shall appoint special counsel to represent state defendants and
16 act instead of the attorney general and the attorney general may not participate in
17 the action. Special counsel appointed under this subsection shall have the powers
18 of the attorney general with respect to the litigation to which special counsel has been
19 appointed. In any proceeding under this section in which the constitutionality,
20 construction or application of any provision of ch. 227, or of any statute allowing a
21 legislative committee to suspend, or to delay or prevent the adoption of, a rule as
22 defined in s. 227.01 (13) is placed in issue by the parties, the joint committee for
23 review of administrative rules shall be served with a copy of the petition and, with
24 the approval of the joint committee on legislative organization, shall be made a party
25 and be entitled to be heard. ~~In any proceeding under this section in which the~~

1 ~~constitutionality, construction or application of any provision of ch. 13, 20, 111, 227~~
2 ~~or 230 or subch. I, III or IV of ch. 16 or s. 753.075, or of any statute allowing a~~
3 ~~legislative committee to suspend, or to delay or prevent the adoption of, a rule as~~
4 ~~defined in s. 227.01 (13) is placed in issue by the parties, the joint committee on~~
5 ~~legislative organization shall be served with a copy of the petition and the joint~~
6 ~~committee on legislative organization, the senate committee on organization or the~~
7 ~~assembly committee on organization may intervene as a party to the proceedings and~~
8 ~~be heard.~~

9 **SECTION 12.** 809.13 of the statutes is amended to read:

10 **809.13 Rule (Intervention).** A person who is not a party to an appeal may
11 file in the court of appeals a petition to intervene in the appeal. A party may file a
12 response to the petition within 11 days after service of the petition. The court may
13 grant the petition upon a showing that the petitioner's interest meets the
14 requirements of s. 803.09 (1) ~~or~~ (2), or (2m).

15 **SECTION 13.** Subchapter VIII (title) of chapter 893 [precedes 893.80] of the
16 statutes is amended to read:

17 **CHAPTER 893**

18 SUBCHAPTER VIII

19 CLAIMS AGAINST GOVERNMENTAL

20 BODIES, OFFICERS AND EMPLOYEES;

21 ACTIONS ALLEGING A STATUTE IS

22 UNCONSTITUTIONAL OR

23 OTHERWISE INVALID

24 **SECTION 14.** 893.825 of the statutes is created to read:

1 **893.825 Actions alleging a statute is unconstitutional or in violation of**
2 **or preempted by federal law.** (1) In an action in which a statute is alleged to be
3 unconstitutional, or to be in violation of or preempted by federal law, the attorney
4 general shall be served with a copy of the proceeding and, except as provided in sub.
5 (2), is entitled to represent the state and be heard.

6 (2) In an action in which a statute is alleged to be unconstitutional, or to be in
7 violation of or preempted by federal law, the speaker of the assembly, the president
8 of the senate, and the senate majority leader shall also be served with a copy of the
9 proceeding and the assembly, the senate, and the joint committee on legislative
10 organization are entitled to be heard.

11 **SECTION 15. Nonstatutory provisions.**

12 (1) INTERVENTION BY ASSEMBLY, SENATE, AND JOINT COMMITTEE ON LEGISLATIVE
13 ORGANIZATION. The assembly, senate, and joint committee on legislative organization
14 may intervene as permitted under s. 803.09 (2m) in any litigation pending in state
15 or federal court on the effective date of this subsection. If the joint committee on
16 legislative organization intervenes and appoints special counsel to represent state
17 defendants as set forth under s. 806.04 (11) or 893.825, the attorney general shall
18 notify the court of the substitution of counsel by special counsel appointed by the joint
19 committee on legislative organization to represent the state defendants and may not
20 participate in the action.

21 **SECTION 16. Fiscal changes.**

22 (1) SETTLEMENT FUNDS. Notwithstanding s. 20.001 (3) (c), from the
23 appropriation account under s. 20.455 (3) (g), on the effective date of this subsection,

2 funds in that appropriation account, as determined by the attorney general.

(END)